In The
Supreme Court of the United States

OCTOBER TERM, 1952

No. 242

VERNIE BAILESS, County Treasurer, Caddo County, Oklahoma, and W. B. COLEMAN, Assessor of Caddo County, Oklahoma, and BOARD OF COUNTY COMMISSIONERS OF CADDO COUNTY, OKLAHOMA, composed of Ted A. Jones, Frank Duncan and George D. Nixon,

Petitioners,

VERSUS

JUANA PAUKUNE,

Respondent.

On Petition for Writ of Certiorari
To the Supreme Court of the State of Oklahoma

BRIEF OF RESPONDENT IN OPPOSITION

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AUGUST, 1952.

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OPINION BELOW

The opinion of the Supreme Court of the State of Oklahoma, which was filed on April 29, 1952, appears in full (R. 46-52).

JURISDICTION

The jurisdictional matter is properly set forth in the Petition.

QUESTIONS PRESENTED

May ad valorem taxes be legally assessed and collected by the State of Oklahoma on an undivided ⅓rd interest devised to a wife of Mexican blood under the will of her full-blood Apache Indian husband, in land allotted by trust patent to the husband under the General Allotment Act of February 8, 1887, c. 119, Section 5, 24 Stat. 389, as amended (25 U.S.C.A. 348) during the trust period, and no final patent having been issued, said trust patent being issued in conformity with said Allotment Act, which provides in part as follows:

> "* * * that the United States does and will hold the land thus allotted, for the period of twenty-five years, in trust for the sole use and benefit of the Indian to whom such allotment shall have been made, or in case of his decease, of his heirs according to the laws of the State or Territory where such land is located, and that at the expiration of said period the United States will convey the same by patent to said Indian, or his heirs as aforesaid, in fee, discharged of said trust and free of all charge or incumbrance whatsoever: * * *."

And said trust patent provides as follows (R. 8):

> "Now know ye, That the United States of America, in consideration of the premises and in accordance with the provisions of the fifth section of the Act of Congress of February 8, 1887 (24 Stats. 388), hereby declares that it does and will hold the land thus allotted, subject to all the restrictions and

conditions contained in said fifth section as modified by the fifth article of the agreement ratified by said sixth section of the Act of June 6, 1900, for the period of twenty-five years, in trust for the sole use and benefit of the said Pau-kune, or in case of his decease, for the sole use of his heirs, according to the laws of the State or Territory where such land is located, and that at the (fol. 18) expiration of said period the United States will convey the same by patent to said Indian, or his heirs, as aforesaid, in fee, discharged of said trust and free of all charge or incumbrance whatsoever."

Is the opinion and holding of the Supreme Court of Oklahoma correct in its holding as follows?:

SYLLABUS (R. 46)

"1. The restrictions under the General Allotment Act and the amendment thereto, February 8th, 1887, c. 119, Section 5, 24 Statutes 389 (25 U.S.C.A. 348) run with the land and are applicable to it, not only in the hands of the allottee but of his heirs as well, regardless of whether the heirs are of Indian blood or not.

"2. Interest of heir in land allotted by Trust Patent under General Allotment Act, February 8th, 1887, c. 119, Section 5, 24 Statutes 389 (25 U.S.C.A. 348) is not subject to ad valorem taxes during trust period.

"3. The undertaking of the United States Government in Trust Patent issued pursuant to General Allotment Act, February 8th, 1887, c. 119, Section 5, 24 Statutes 389 (25 U.S.C.A. 348), is to convey the lands at the end of the trust period free of all charge or encumbrance and imposes an obligation to keep the lands free from the burden or charge of State taxation, as well as of every other encumbrance."

STATUTE INVOLVED

The sections of the statutes governing this case are found in the General Allotment Act of February 8, 1887, and can be found at Sections 1118 to 1137, inclusive, of *Mill's Oklahoma Indian Land Laws*, Second Edition (25 U.S.C.A. 331, *et seq.* as amended). 25 U.S.C.A. 348, 339 and 373 are the applicable sections covering the land involved in this case.

STATEMENT

The statement of facts as given on Pages 3 to 7 of the Petition is a fair statement, except that the second paragraph on Page 4 of the Petition about the case of *Levindale Lead & Zinc Mining Co.* v. *Coleman*, 241 U.S. 432, is not applicable to the land involved herein for the reason that that case involved an Osage Indian allotment and is expressly excluded from the General Allotment Act of February 8, 1887 (Sec. 25, U.S.C.A. 339).

ARGUMENT

The case before this Court involves the Apache full-blood Indian Allotment of Pau-kune and is governed by the General Allotment Act of February 8, 1887 (25 U.S.C.A. 348 and 373).

The land involved in this suit was allotted to Pau-kune, a full-blood Apache Indian, and is located in Sec-

tion 10, Township 5 North, Range 9 West, Caddo County, Oklahoma, and trust patent was issued pursuant to Section 5 of the General Allotment Act, on August 25, 1901, for a trust period of 25 years which has been extended pursuant to law. Pau-kune died testate in 1919 and left a will devising a 1/3rd interest in the 160-acre allotment to his Mexican wife, Juana Paukune and the other 2/3rds to his son, Jose Paukune.

We think the statement of facts set out in the Petition is a fair statement, except that we do not concur in the statement that the Secretary of the Interior has construed the General Allotment Act by reason of the holding in the *Levindale Lead & Zinc Mining Co.* v. *Coleman*, 241 U.S. 432, as freeing allotted lands held in trust by the U. S. Government under the General Allotment Act from all restrictions upon passing to a non-Indian devisee or heir, and if he did so construe the same in his letter referred to by the petitioner, it is in contravention of the provisions of Section 5 of the General Allotment Act of February 8, 1887, above referred to.

The petitioner is relying primarily upon the case of *Levindale Lead & Zinc Mining Co. et al.* v. *Charles Coleman*, 241 U.S. 432, 60 L. ed. 1080, which involved lands inherited by a white man from his Osage Indian wife and child, who were members of the Osage tribe. The question involved the construction of the Osage

Allotment Act of June 28, 1906 (34 Stat. 539, Chapter 3572). This Act did not protect non-members.

The Supreme Court of Oklahoma, in the last paragraph of its opinion (R. 52) held that this Osage Indian Allotment case was not a case in point for the reason that it involved an Osage Indian allotment and that the Osage tribe was expressly excepted from the General Allotment Act. The Osage Allotment Act of June 28, 1906, governs Osage allotments and can be found at Sections 1275 to 1308 of *Mill's Oklahoma Indian Land Laws*, Second Edition, and applies only to Osage Indian allotments.

The Act of Congress of February 4, 1913, 37 Stat. 678, c. 55 (25 U.S.C.A. 373), was an Act providing for the disposal by will of allotments of Indians held in trust and provides as follows:

> "That the approval of the will and the death of the testator shall not operate to terminate the trust or restrictive period, but the Secretary of the Interior may, in his discretion, cause the lands to be sold and the money derived therefrom, or so much thereof as may be necessary, used for the benefit of the heir or heirs entitled thereto, remove the restrictions, or cause patent in fee to the legatee or legatees either in whole or in part from time to time as he may deem advisable, or use it for their benefit. Provided also, that this and the preceding section shall not apply to the Five Civilized Tribes or the Osage Indians."

This provision expressly excludes the Osages.

The above quoted provision of the 1913 Act was construed in *Blanset* v. *Cardin*, 256 U.S. 319, 65 L. ed.

950, which involved a Quapaw Indian allotment. The Court said at Page 327 of the opinion:

> "Our conclusion is the same as that of the court of appeals, 'that it was the intention of Congress that this class of Indians should have the right to dispose of property by will under this Act of Congress, free from restrictions on the part of the state as to the portions to be conveyed, or as to the objects of the testator's bounty; provided such wills are in accordance with the regulations and meet the approval of the Secretary of the Interior.' The court added that the conclusion was in accord with the views of the Supreme Court of the State, referring to *Brock* v. *Keifer*, 59 Okla. 5, 157 Pac. 88."

To the same effect is the case of *Hansen* v. *Hoffman*, 113 F. 2d 780, which also involved a Quapaw Indian allotment and construed this same 1913 Act.

The Quapaws were governed by a special Act of March 2, 1895, and amendments thereto (Secs. 1363 to 1366, *Mill's Oklahoma Indian Land Laws*, 2nd Edition). (28 Stat. 907.) The Quapaws were not issued trust patents under the General Allotment Act, but were delivered patents in fee, subject to restrictions upon alienation for a period of twenty-five years from date of patent, and applied to the allottee and his heirs as well and the restrictions ran with the land.

U. S. v. *Noble*, 237 U.S. 74,
59 L. ed. 844;
Ewert v. *Bluejacket*, 259 U.S. 129,
66 L. ed. 858.

LaMotte v. *United States*, 254 U.S. 570, 65 L. ed. 410, involved an Osage Indian allotment and the Court

held that under the Osage Allotment Act, the lands passed to the member's heirs and the lease was procured from them and they were members without Certificate of Competency and the lease had not been approved by the Secretary. In further construing the Act the Court held that the Act of February 14, 1913, expressly excepted Osages. The case was governed by the Osage Act.

We think the confusion has arisen in the case at Bar from the fact that the petitioner is relying upon the *Levindale Lead & Zinc Mining Co. case* which involved an undivided interest in lands inherited by Charles Coleman, a white man, from his Indian wife and child, who were members of the Osage tribe. The Osage Act provided for the issuance of certificates of competency to Indians, but not white men, and upon the issuance of such certificates the land became subject to taxation. This case was strictly governed by the Osage Allotment Act and not the General Allotment Act of February 8, 1887. The Osage Allotment Act did not make any provision for protecting white men. It was only for the protection of Indians.

The case at Bar involves a full-blood Apache Indian allottee under the General Allotment Act of February 8, 1887, 25 U.S.C.A. 348 and 373. Neither of these provisions apply to the Osages; in fact, the General Allotment Act of February 8, 1887, expressly excludes Osages (Section 1134, *Mills' Oklahoma Indian Land Laws*,

Second Edition; 25 U.S.C.A. 339, Section 8, c. 119; Act of February 8, 1887, 24 Stat. 391). The *Levindale Lead & Zinc Mining Co. case* was decided in the District Court of the State of Oklahoma in December, 1910. The Osage Allotment Act of June 28, 1906, which provided for the division of lands and funds of the Osage Indians, is found at Sections 1275 to 1308 of *Mills' Oklahoma Indian Land Laws*, Second Edition. The Supplementary Act of April 18, 1912, amending the Osage Allotment Act of June 28, 1906, is found at Paragraphs 1309 to 1319 of *Mills' Oklahoma Indian Land Laws*, Second Edition. Section 6 of the amendatory Osage Act expressly provided:

> "When the heirs of such deceased allottees have certificates of competency or are not members of the tribe, the restrictions on alienation are hereby removed."

By the plain provisions of the Osage Allotment Act and the amendatory Act thereto, white men and persons not members of the tribe were not restricted.

The Act of February 14, 1913 (25 U.S.C.A. 373), which provided for the disposal of allotments held under trust by will applied to Apache Indians and said Act governs the land involved in this case, 1/3rd of which was devised by Pau-kune to his Mexican wife and 2/3rds to his half-blood Apache Indian son, Jose Paukune. Under the plain provisions of Section 5 of the General Allotment Act of February 8, 1887, and under the plain

provisions of the 1913 Act, *supra*, the trust or restrictive period was not terminated, although the Act does give the Secretary of the Interior authority to sell the land, remove the restrictions, or cause a patent in fee to be issued to the devisee, but the Secretary of the Interior has not seen fit to do this and Juana Paukune's interest in her full-blood Apache Indian husband's allotment is still being held in trust by the United States Government, free of all charge or incumbrance whatsoever and the State of Oklahoma has no right to interfere with the same by attempting to tax it. The respondent does not claim that this land is impliedly exempt; the respondent claims that this land is exempt under the plain provisions of Section 5, of the General Allotment Act of February 8, 1887, and the plain provisions of the Act of February 14, 1913, c. 55, 37 Stat. 678, 25 U.S.C.A. 373, and will remain restricted until the fee simple patent is issued to the devisees of Pau-kune, or until the trust period expires, and that said restrictions run with the land.

I.

THE DECISION BELOW IS CORRECT

The decision of the Supreme Court of Oklahoma follows the uniform rule announced by the Supreme Court of the United States.

The decisions of the Supreme Court of the United States are all in harmony in construing Section 5 of

the General Allotment Act of February 8, 1887 (25 U.S.C.A. 348). There is uniformity and no conflict.

United States v. *Rickert*, 188 U.S. 432, 47 L. ed. 532, was a suit instituted under the direction of the Attorney General of the United States for the purpose of restraining the collection of the tax alleged to be due the County of Roberts, South Dakota, in respect of certain permanent improvements on and personal property used in the cultivation of lands in that county occupied by the Sisseton band of Sioux Indians in the State of South Dakota. At Page 538 of the Law Edition (441 of the United States) the Court said:

> "* * * The patent or grant here referred to is the final patent or grant which invests the patentee or grantee with the title in fee, that is, with absolute ownership. No such patent or grant has been issued to these Indians. So that the appellee cannot sustain the taxation in question under the clause of the State Constitution to which he refers, and the right to tax these lands must rest upon the general authority of the Legislature to impose taxes. But, as already said, no authority exists for the State to tax lands which are held in trust by the United States for the purpose of carrying out its policy in reference to these Indians."

In *Bowling* v. *United States*, 233 U.S. 528, 58 L. ed. 1080, the Court said in discussing the matter of taxation under the General Allotment Act which was extended to the Wea Tribe of Indians, at Page 1083, L. ed.:

"If, therefore, the conveyance by the allottee's heirs in the present case, would otherwise have been subject to cancelation, it was not saved by reason of the judgment entered in their suit against the purchaser.

"The question, then, is whether the restriction imposed by the Act of 1889 was a merely personal one, operative only upon the allottee, or ran with the land, binding his heirs as well. This must be answered by ascertaining the intent of Congress as expressed in the statute. The restriction was not limited to 'the lifetime of the allottee,' as in *Mullen* v. *United States*, 224 U.S. 448, 453, 56 L. Ed. 834, 839, 32 Sup. Ct. Rep. 494, nor was the prohibition directed against conveyances made by the allottee personally. Congress explicitly provided that 'the land so allotted' should not be subject to alienation for twenty-five years from the date of patent. 'Said lands so allotted and patented' were to be exempt 'from levy, sale, taxation, or forfeiture for a like period of years.' The patent was expressly to set forth that 'the land therein described and conveyed' should not be alienated during this period, and all contracts 'to sell or convey such land' which should be entered into 'before the expiration of said term of years' were to be absolutely void. These reiterated statements of the restriction clearly define its scope and effect. It bound the land for the time stated, whether in the hands of the allottee or of his heirs. Moreover, the subsequent legislation, relating to the same subject-matter, which expressly provided for conveyances by heirs of allottees, subject to the approval of the Secretary of the Interior, leaves no room for doubt as to the intention of Congress. *United States* v. *Freeman*, 3 How. 556, 564, 11 L. Ed. 724, 727; *Cope* v. *Cope*, 137 U.S. 682, 688, 34 L. Ed. 832, 834, 11 Sup. Ct. Rep. 222; *Marchie Tiger* v. *Western Invest. Co.*, 221 U.S. 309, 55 L. Ed. 747, 31 Sup. Ct. Rep. 578.

"The conveyance by Wea's heirs came directly within the statutory prohibition, and the later conveyances under which the appellants claim must fall with it."

In the case of *United States* v. *Getzelman* (C.C.A. 10, April 5, 1937), 89 F. 2d 531, in discussing the General Allotment Act, Page 534, the court said:

"(1) It is expressly provided in Section 5 of the General Allotment Act of 1887 that upon the approval of allotments therein authorized, trust patents shall issue containing a provision that the United States will hold the land in trust for a period of twenty-five years; that at the expiration of such period it will be conveyed to the allottee or his heirs discharged of such trust and free of charge or incumbrances; and that any conveyance or contract of conveyance made during that period shall be void. It is further provided that the President shall have power in his discretion to extend the trust period. 24 Stat. 388, 389 (25 U.S.C.A. 348). Allotments to the members of the Pottawatomie Tribe in accordance with the terms of that Act were specifically authorized and expressly confirmed in 1891. 26 Stat. 989, 1017. The original trust patents to John and Mary for their respective allotments were issued under these provisions of law. The equitable title thereupon passed to the allottees, while the legal title remained in the United States in trust for their use and benefit. *United States* v. *Rickert*, 188 U.S. 432, 23 S. Ct. 478, 47 L. Ed. 532; *Hallowell* v. *Commons* (C.C.A.), 210 Fed. 793."

In the case of *United States* v. *F. H. Reily*, 290 U.S. 33, 78 L. ed. 154, a suit was brought by the United States to enforce its rights and regulations governing allotted Indian land held under a so-called trust patent

issued pursuant to Section 5 of the General Allotment Act of February 8, 1887 (25 U.S.C.A. 348), which provided that the land should be inalienable for a designated period which the president might extend and that any alienation contrary to the restriction should be void. The Court said at Page 155 of the L. ed. and at Page 35 of the U.S. Rep.:

> "It is settled, and is conceded, that a restriction on alienation such as is here shown is not personal to the allottee but runs with the land and operates upon the heir the same as upon the allottee. So it is apparent the heir's conveyance was void, unless in some way the restriction was removed before the conveyance was made."

The Court cited with approval the cases of *Bowling* v. *U. S.*, 233 U.S. 528, 535, 58 L. ed. 1080, 1083, and *U. S.* v. *Noble*, 237 U.S. 74, 80, 59 L. ed. 844, 847.

In the case of *Board of County Commissioners of Caddo County, Oklahoma* v. *United States* (C.C.A. 10, December 14, 1936), 87 F. 2d 55, the court said at Page 56:

> "The trust patent issued under the provisions of Section 5 of the Act of February 8, 1887, 24 Stat. 389 (25 U.S.C.A. 348). The trust period fixed was twenty-five years, with the further provision that the President should have power, in his discretion, to extend it. By executive order dated March 18, 1926, the President extended the period ten years. The Act of February 26, 1927, 44 Stat. 1247, 25 U.S.C.A. 352a, authorized the Secretary of the Interior, in his discretion, to cancel any patent in fee simple issued to an Indian allottee during the original trust period or any extension of it, if such pat-

ent was issued without the application or consent of the allottee or his heirs, provided the patentee had not sold or mortgaged any of the land. Acting upon the authority thus conferred, the Secretary made an order on October 31, 1931, canceling the fee patent in question.

"(1) The Act of Congress, and the terms of the patent issued pursuant to it, created an immunity from taxation under the laws of the State. That immunity was a presently vested right in the allottee which was binding upon the State and its subdivisions and could not be taken from her by the mere issuance of the fee patent during the trust period. *Choate* v. *Trapp*, 224 U.S. 665, 32 S. Ct. 565, 56 L. Ed. 941: *Morrow* v. *United States* (C.C.A.), 243 Fed. 854; *United States* v. *Board of Commissioners* (D.C.), 13 Fed. Supp. 641."

In *Egan* v. *McDonald*, 246 U.S. 227, 62 L. ed. 680, the Court said at Page 682:

"McDonald's title was this (1) A twenty-five year patent dated December 12, 1895, for an Indian allotment issued to Weasel under Sec. 11 of Act of Congress, March 2, 1889, Chap. 405, 25 Stat. at L. 888, 891); (2) Deed to R. J. Huston dated October 9, 1908, from Plays and two others therein described as 'sole and only heirs of Weasel, deceased, a Crow Creek Sioux Indian,' approved by the Secretary of the Interior, March 2, 1909, and thereafter duly recorded in the Department of the Interior and the Registry of Deeds; (3) a final decree of distribution of the estate of Weasel in the county court, making distribution of the land to Plays and two others as only heirs; (4) deed from Huston to McDonald, dated November 3, 1910; (5) a decree of the state circuit court, entered in 1912 in a suit brought by McDonald to quiet title, and declaring him to be the owner in fee of the land.

"First: As to the power of Weasel's heirs to convey: The trust patent was issued under Sec. 11 of the Act of Congress of March 2, 1889. Under the provisions of that statute and the terms of the trust patent, the heirs, as well as Weasel, were without power to convey title before the expiration of the twenty-five years. But, by Sec. 7 of the Act of Congress, May 27, 1902 (32 Stat. at L. 275, Chap. 888, Comp. Stat. 1916, Sec. 4223), adult heirs were given power to convey with the approval of the Secretary of the Interior; and it is declared that 'such conveyances * * * when so approved shall convey a full title to the purchaser, the same as if a final patent without restriction upon the alienation had been issued to the allottee.' Congress had, of course, power to remove the restrictions originally imposed upon alienation by heirs. *Williams* v. *Johnson*, 239 U.S. 414, 420, 60 L. Ed. 358, 360, 36 Sup. Ct. Rep. 150."

25 U.S.C.A. 379 (Sec. 7, 23 Stat. 275, c. 888, May 27, 1902):

"* * * but all such conveyances shall be subject to the approval of the Secretary of the Interior, and when so approved shall convey a full title to the purchaser, the same as if a final patent without restriction upon the alienation had been issued to the allottee. All allotted land so alienated by the heirs of an Indian allottee and all land so patented to a white allottee shall thereupon be subject to taxation under the laws of the State or Territory where the same is situate: * * *."

We think the above section is rather significant in that it expressly provides that all the land so alienated by the heirs of an Indian allottee and all lands so patented to a white allottee shall thereupon be subject to taxation, but all the conveyances must be subject to the

approval of the Secretary of the Interior. This shows that the United States intends to keep control over these lands and to hold the fee simple title to them until the Government sees fit to issue a final fee simple patent, at which time these lands will be taxable, or until such time as the Secretary of the Interior sees fit to approve a conveyance.

In *Charles S. Childers, State Auditor of the State of Oklahoma, Appt.* v. *John Beaver and Benjamin Quapaw*, 270 U.S. 555, 70 L. ed. 730, the Court said at Page 732 of the L. ed.:

> "It must be accepted as established that during the trust or restrictive period Congress has power to control lands within a State which have been duly allotted to Indians by the United States and thereafter conveyed through trust or restrictive patents. This is essential to the proper discharge of their duty to a dependent people; and the means or instrumentalities utilized therein cannot be subjected to taxation by the State without assent of the Federal Government."

In the case of *County of Mahnomen* v. *United States*, 319 U.S. 474, 87 L. ed. 1527, an action was brought by the Government in a Federal District Court to recover real estate taxes alleged to have been illegally collected by Mahnomen County Minnesota from Isabelle Garden, an Indian allottee. The county claimed that Garden was an emancipated Indian who paid his taxes voluntarily. The Court said at Page 1530 of L. ed. and Page 476 of U. S. Rep.:

"In 1902, the Secretary of the Interior, acting under congressional authority, issued a patent to this Indian allottee, agreeing to hold a tract of land in trust for twenty-five years 'for the sole use and benefit of the Indian' and then convey the land to her 'discharged of said trust and free of all charge or incumbrance whatsover.' Indian land so held by the Government has been said to be exempt from all State taxation. *United States* v. *Rickert*, 188 U.S. 432, 436-438, 47 L. ed. 532, 535, 23 S. Ct. 478. The first and second Clapp Amendments, passed in 1906 and (March 1) 1907 lifted restrictions previously imposed upon the sale, encumbrance and taxation of the allotments of adult mixed-blood Indians, and in addition declared that 'the trust deeds heretofore or hereafter executed by the Department for such allotments are hereby declared to pass the title in fee simple.' Garden is an adult mixed-blood Indian and has been an adult since 1911, when the first controverted tax payment was made. These amendments evidence 'a legislative judgment that adult mixed-blood Indians are, in the respects dealt with in the Act, capable of managing their own affairs, and for that reason they are given full power and authority to dispose of allotted lands.' *United States* v. *Waller*, 243 U.S. 462, 61 L. ed. 843, 847, 37 S. Ct. 430; *Baker* v. *McCarthy*, 145 Minn. 167, 170, 176 N.W. 643.

"Notwithstanding these Acts of the county concedes, and we assume arguendo, that it was without power to impose a tax upon these allotted lands prior to 1928 against the consent of the Indians. *Choate* v. *Trapp*, 224 U.S. 665, 56 L. ed. 941, 32 S. Ct. 565.

"The Clapp Amendment gives the consent of the United States to state taxation, thus removing the barrier to taxation found to exist in *United States* v. *Rickert*, 188 U.S. 432, 47 L. ed. 532, 23 S. Ct. 478, *supra*; but under *Choate* v. *Trapp*, the Indian

who has gained a vested right not to be taxed, must also consent."

CONCLUSION

For the foregoing reasons it is respectfully submitted that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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AUGUST, 1952.